

FRANCIS M. PLASS

IBLA 96-224

Decided July 20, 1998

Appeal from a decision of the Klamath Falls Resource Area Office, Bureau of Land Management, determining a cost recovery category for a right-of-way application.

Affirmed.

1. Public Lands: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Use of a road across public lands for access by inholders does not constitute casual use when such use causes damage to the road and the environment.

2. Public Lands: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Access to an inholding by use of a road across public lands which may not qualify as casual use is subject to reasonable regulation by BLM in the form of a right-of-way grant to protect the public lands and their resources.

APPEARANCES: Francis M. Plass, pro se; Thomas R. Cottingham, Realty Specialist, Klamath Falls Resource Area, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Francis M. Plass has appealed from the February 13, 1996, Decision of the Klamath Falls Resource Area Office, Bureau of Land Management (BLM), determining a cost recovery category in connection with his application for a right-of-way. The right-of-way was sought for use of an existing road across public lands to the summit of Stukel Mountain where Appellant maintains a communication site on private land.

Appellant explains that he leases the private land on which he provides communications facilities that serve the public interest. He states that weather-related damages at the site made it necessary for him to get immediate access to the site, but because of BLM's winter closure of the road, he was locked out and was required to apply for a right-of-way in

order to get a key to use the road. Appellant asserts that his use qualifies as casual use for which no right-of-way is required under the regulations, citing 43 C.F.R. § 2800.0-5(m).

Appellant filed his application on January 31, 1996, and by Decision dated February 13, 1996, BLM advised Appellant that under the cost-reimbursement provisions of the regulations, his application falls under Category I. Hence, Appellant was required to submit a nonrefundable application processing fee of \$125. 43 C.F.R. § 2808.3-1. <sup>1/</sup> Appellant was also required to pay \$50 in monitoring costs. See 43 C.F.R. § 2808.4.

The Answer filed by BLM stated that 13 other right-of-way holders proportionately share in the maintenance expense of the road and Appellant would likewise be required to do so. Appellant has responded that what these other right-of-way holders do should not affect his status.

Noting that under the regulation at 43 C.F.R. § 2800.0-5(m) a right-of-way is not required for casual use, Appellant contends this should include travel on existing roads to access private property. Appellant recognizes that the winter closure of the road is for the stated purpose of minimizing the impact or danger to wildlife due to unrestricted use by the general public during the most vulnerable time of the year, but notes that a right-of-way holder is exempt from those restrictions. To the extent BLM recognizes an exemption for a right-of-way holder, Appellant argues it is inconsistent to deny his inherent right of access to private property. Appellant contends that the effect of the management plan is not compromised by allowing his right of access and that he should not be required to obtain a right-of-way.

In its Answer, BLM acknowledges that Appellant must use BLM roads and lands to reach his communication site, but notes that the Resource Management Plan (RMP) for the Klamath Falls Resource Area approved on June 2, 1995, prohibits all vehicle use on Stukel Mountain from November 1 to April 15. See RMP at 51-52. While BLM states that it considers commercial use of private lands sufficient justification to review and grant exceptions to seasonal road closures, it disputes Appellant's assertion that his use during the winter qualifies as casual use under the right-of-way regulations at 43 C.F.R. § 2800.0-5(m). The BLM has determined that winter use of the road will eventually cause damage to the road requiring repair. Further, BLM contends there can be no casual use of a road that is closed because that would make the closure ineffective.

It is pointed out by BLM that the holder of a right-of-way is authorized to use a road which is closed to public use. In this way, damage to roads and disturbance to wildlife can be minimized and the cost of repair of the public land, roads, and resources can be assessed against the authorized users.

Appellant responds that a private property owner historically has not been restricted from accessing his property by an existing road, and

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<sup>1/</sup> BLM's decision erroneously refers to 43 C.F.R. § 2803.3-1.

requests a copy of any law that abrogates this principle. It appears that Appellant is claiming a common law easement by way of necessity. An easement by necessity is described in 3 Tiffany, Real Property § 793, at 284-86 (3d ed. 1939) as follows:

Such an easement ordinarily arises when one conveys to another land entirely surrounded by his, the grantor's, land, or which is accessible only across either the grantor's land or the land of a stranger. In such a case, unless the conveyance is regarded as giving, as appurtenant to the land conveyed, a right of way over the land retained by the grantor, the grantee can make but a limited use, if any, of the land conveyed to him, and the courts, in pursuance of considerations of public policy favorable to the full utilization of the land, and in accordance with the presumable intention of the parties that the land shall not be without any means of access thereto, have established this rule of construction that, in the absence of indications of a contrary intention, the conveyance of the land shall in such case be regarded as vesting in the grantee a right of way across the grantor's land.

(Footnotes omitted.) However, common law principles applicable to private property do not always apply to land owned by governments. Although the land on which Appellant maintains his communication site was originally patented by the United States, it does not necessarily follow that he may claim an easement by way of necessity across land remaining in Federal ownership.

In Sun Studs, Inc., 27 IBLA 278, 284-92, 83 I.D. 518, 520-25 (1976), this Board gave careful consideration to whether issuing a patent could make other land owned by the United States subject to an easement by way of necessity. We concluded that a patent from the United States does not convey an implied easement by way of necessity across public land in the absence of legislation by Congress.

[1] Whatever access BLM is obliged to provide Appellant depends on the legislation under which the land was patented as well as any special legislation governing administration of the land. For example, in Bob Strickler, 106 IBLA 1 (1988), we affirmed a BLM decision that terminated casual use of a road across Federal lands and required inholders to apply for a right-of-way for continued use of the road. The inholdings were patented mining claims, and we held that nothing in the general mining laws invests residents on patented mineral land with a right of access across Federal land, when it appears from the record that the land is not subject to mineral exploration and development. In affirming the BLM decision requiring the inholders to obtain a right-of-way, we noted that use of the road by inholders did not qualify as casual use under 43 C.F.R. § 2800.0-5(m) because use during the wet winter months caused damage to the road and the environment. Bob Strickler, *supra*, at 4-6.

In Utah v. Andrus, 486 F. Supp. 995, 1011 (D. Utah 1979), the court found that there was an implied right of access across Federal land to

sections of land granted to a State under its Statehood Act for the support of public schools, but also found that such access was subject to reasonable regulation by the Government. In Alvin R. Platz, 114 IBLA 8, 97 I.D. 125 (1990), we reversed a BLM decision rejecting an application for a right-of-way providing for motorbike access on an existing trail to a patented mining claim within a Wild and Scenic River Area, holding that such action was contrary to the access secured by section 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1994). Finally, we note that a provision of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3210(b) (1994), requires the Secretary to provide such access to non-Federally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-82 (1994), as is adequate to secure to the owner the reasonable use and enjoyment thereof, but also provides that such owner may be required to comply with rules and regulations applicable to access across public lands. In Montana Wilderness Association v. U.S. Forest Service, 655 F.2d 951 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982), the court concluded that this provision had nationwide applicability with respect to land in the National Forest System.

[2] Unlike the case in Sun Studs where the Board affirmed the denial of an application for a right-of-way that would provide the only road access to a site, BLM is not denying Appellant access. As in Strickler, *supra*, BLM proposes to grant a right-of-way, thus ensuring compliance with rules governing use of the access road. Appellant contends that such a grant is unnecessary. Even where a right of access exists, however, such access is subject to reasonable regulation by the Government, Utah v. Andrus, *supra*, and the right-of-way provisions of FLPMA, 43 U.S.C. §§ 1761-71 (1994), provide the statutory authority which enables BLM to recognize and regulate access by means of a road. See 43 U.S.C. § 1761(a)(3) (1994); Alvin R. Platz, *supra*; Bob Strickler, *supra*. Even in cases where the United States owns the land on which a communication site is to be placed, the right-of-way for the site itself does not ordinarily include authorization to use other public land for permanent access to the site; such authorization can only be accomplished through the issuance of a separate right-of-way. See Mesa Wind Developers, 113 IBLA 61, 64 (1990). Accordingly, we are unable to find that Appellant has established error in the BLM Decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge